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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1987

UNITED STATES OF AMERICA

Petitioner,

vs.

A & B HEATING AND AIR CONDITIONING, INC.

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF RESPONDENT IN RESPONSE TO PETITION OF THE UNITED STATES OF AMERICA FOR WRIT OF CERTIORARI

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STATUTES INVOLVED

In addition to the statutes set forth in the Petition for Writ of Certiorari filed by the United States of America, Section 1129 of the Bankruptcy Code, 11 U.S.C. (& Supp. IV) 1129, provides in pertinent part:

Confirmation of Plan

(a) The Court shall confirm a Plan only if all of the following requirements are met:

. . .

(11) Confirmation of the Plan is not likely to be followed by the liquidation or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

SUMMARY OF ARGUMENT

Payments made pursuant to a confirmed Chapter 11 plan are voluntary payments such that the application of the payments may be designated by the taxpayer. Payments made pursuant to a confirmed Chapter 11 plan are not compelled or coerced by the Bankruptcy Court, which serves only to ensure that the statutory requirements for confirmation set forth in 11 U.S.C. §1129 are met. If the concern of the Petitioner is that a default in making payments pursuant to the Chapter 11 plan could in some fashion jeopardize the public fisc then the proper objection to have raised to confirmation of the Chapter 11 plan was one based on

11 U.S.C. §1129 (a)(11) asserting an insufficient showing of feasibility, and demonstrating a potential for further reorganization or liquidation.

Moreover, the ability to designate the application of tax payments is of great importance in the case of a closely-held corporate debtor. The Respondent, as with many closely held corporations, depends on the continued, complete attention of the officer or other person against whom liability is asssessed pursuant to 26 U.S.C. §6672 for its continued ability to be a productive business generating sufficient income to fund any payments pursuant to a Chapter 11 plan.

REASON FOR DENYING THE PETITION

The question of whether tax payments made pursuant to a confirmed Chapter 11 plan are voluntary such that the application of the payment can be designated by the taxpayer is now moot in this case. Arthur Clement, Jr., the sole officer, director and shareholder of the Respondent has paid in full, without deduction or credit for any payments made by Respondent pursuant to its confirmed Chapter 11 plan, all liability assessed against him pursuant to 26 U.S.C. §6672. Therefore, all payments received by Petitioner pursuant to the Chapter 11 plan can now be applied without regard to the designation set forth in Respondent's plan.

CONCLUSION

The petition for a writ of certiorari should be denied, as moot.

Respectfully submitted,

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April 1988